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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MARK C. ESTES, LEIF N. BOWMAN, DENETTA MALAVE, and CARY DEAN TALBOT

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Appeal 2015-001923
Application 13/279,150
Technology Center 3700

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Before JOHN C. KERINS, STEFAN STAICOVICI, and LEE L. STEPINA, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Mark C. Estes et al. (Appellants) appeal under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1, 4–10, 13–19, and 26–28. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

THE INVENTION

Appellants' invention relates to systems for delivering and monitoring medications.

Claims 1 and 10 are independent. Claim 1 is illustrative of the claimed invention and reads as follows:

> 1. A system for delivering medication, comprising:
>
> an infusion pump including an alarm to indicate status of the infusion pump; and
>
> a control system for controlling medication delivery by the infusion pump;
>
> wherein:
>
> the control system includes an alarm profile function for programming a variable alarm volume of the alarm;
>
> the alarm profile function varies the variable alarm volume according to a daily schedule; and
>
> the variable alarm volume
>
> provides a first alarm volume during a first period of hours in a day; and
>
> provides a second alarm volume during a second period of hours in the day; such that different volume levels are provided for different periods of hours of the day.

## THE REJECTIONS

The Examiner has rejected:

(i) claims 1, 4–10, 13–19, and 26–28 under 35 U.S.C. § 103(a) as being unpatentable over Mann (WO 00/10628 A2, published Mar. 2, 2000) and Arzoumanian (US 5,382,941, issued Jan. 17, 1995).

(ii) claims 1, 10, 16, and 18 under 35 U.S.C. § 103(a) as being unpatentable over Lebel (US 2002/0019606 A1, published Feb. 14, 2002) and Arzoumanian.

Appellants canceled claims 20–25 in an Amendment filed subsequent to the Final Office Action on June 30, 2014. That Amendment was entered in an Advisory Action dated July 30, 2014. As such, the rejections of now-canceled claims 20–25 that are present in the Final Office Action are moot, notwithstanding that the Examiner's Answer does not identify the rejections as having been withdrawn.

## ANALYSIS

*Claims 1, 4–10, 13–19, and 26–28--Obviousness--Mann/Arzoumanian*

The Examiner finds that Mann discloses most of the limitations of claim 1 including "an alarm profile function for programming a variable alarm volume of the alarm." Final Act. 5. (citing Mann, p. 14, ll. 22–25 and p. 40, l. 13–p. 41, l. 6). The Examiner relies on Arzoumanian as teaching an alarm volume that varies according to a daily schedule, wherein different volume levels are provided for different times of the day. *Id.* at 6 (citing Arzoumanian, col. 1, l. 65–col. 2, l. 7). The Examiner concludes that it would have been obvious to modify Mann to vary the alarm volume according to a daily schedule so that different volume levels are provided for different times of the day, as taught by Arzoumanian, "in order to adjust the alarm volume to be quieter and less startling at night and to be louder during waking hours." *Id.*

Appellants argue that Arzoumanian fails the established "'two-prong test' for determining whether particular references are analogous art." Appeal Br. 3 (citing *In re Deminski*, 230 USPQ 313 (Fed. Cir. 1986) and *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). Appellants assert that

Arzoumanian does not meet the first prong because "the Arzoumanian invention is from a different field of endeavor as the Mann and Lebel inventions and the claimed invention (i.e. electrical communications in the field of car alarms as compared to surgery in the field of medicine)." *Id.* at 4. Appellants assert that the second prong also is not met because Arzoumanian is not reasonably pertinent to the problem of "suboptimal dosing of therapeutic agents via systems and methods that can, for example, provide alarms to diabetic patients that prompt them to modulate their glucose levels (e.g. by administering a dose of insulin)." *Id.* at 5.

The Examiner responds that "the field of endeavor common to the prior art and the claimed invention is alarm control." Ans. 2. The Examiner states that the rejection does "not rely on Arzoumanian for teachings related to the broad suboptimal medicinal dosing problem, but for the teachings of controlling the volume of an alarm based on the needs of the user, such as during different times of day." *Id.* at 3. The Examiner notes that because "the claimed invention and Arzoumanian seek to solve the problem of different volume levels being necessary depending on different environments," Arzoumanian is reasonably pertinent to the inventor's problem. *Id.* at 3–4.

In reply, Appellants reiterate that Arzoumanian is not in the medical device field and thus is not analogous prior art under the first prong of the analogous art test. Reply Br. 4. Appellants argue that "[*i*]*t is not common sense* to conclude that physicians or other health care personnel will turn their attention to patent publications in the field of car alarms when thinking about problems such as patient control over the delivery of therapeutic

agents," and thus, "Arzoumanian cannot qualify as prior art under the second prong of the Federal Circuit's two prong test for analogous art." *Id.* at 5.

Regardless as to whether Arzoumanian could properly be regarded as being in Appellants' field of endeavor, we do not agree that the teachings of Arzoumanian are not reasonably pertinent to the problem faced by the inventors. Appellants disclose that "the user can select different volume levels for different time periods of the day," and that this "enables users to have a desired alarm volume at a desired time without having to manually change the volume setting daily." Spec., para. 73. Therefore, an inventor faced with the problem of changing the volume setting at different times of the day would look for suitable mechanisms that permit automatic volume adjustment, and, as the Examiner correctly finds, Arzoumanian discloses "control of the alarm set signal by a circuit that adjust[s] the alarm set chirp volume automatically depending upon the outside li[ght] conditions." Arzoumanian, col. 2, ll. 1–4; *see also* Final Act. 6. Accordingly, the Examiner is correct that Arzoumanian is analogous art. *See* Ans. 3–4. Moreover, we note that Appellants' statement of the problem attempts to focus the analysis not on the problem at issue, i.e., desired alarm volume at a desired time, but on the specific application and setting identified in the Specification--"medication infusion pumps used to deliver therapeutic agents such as insulin." Reply Br. 5; *see also* Spec., para. 2. This is more in line with the "field of endeavor" prong, whereas the realm of analogous prior art is not so limited, and includes art that is reasonably pertinent to the problem faced by an inventor. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 35 (1966) (rejecting the argument that the cited references

were not "pertinent prior art" and stating that "[t]he problems confronting [the patentee] and the insecticide industry were not insecticide problems; they were mechanical closure problems").

Appellants also argue that "by distilling the Arzoumanian invention to 'controlling the volume of an alarm based on the needs of the user', the Examiner improperly disregards the legal requirement of analyzing the Arzoumanian subject matter 'as a whole.'" Appeal Br. 7. This legal requirement is in place to ensure that portions of a reference that might be seen as teaching away from an Examiner's proposed modification or combination are considered as well. However, Appellants point to nothing in Arzoumanian that might be regarded as such. The Examiner responds that the rejection does not distill Arzoumanian down to a gist, but instead relies on it for a specific teaching of alarm volume control during different time periods of the day." Ans. 4. Arzoumanian explicitly teaches using "a low or high volume depending upon the light conditions." Arzoumanian, col. 2, ll. 14–18; *see also* Ans. 4. We do not find error in the Examiner's reliance on a particular and explicit teaching in the Arzoumanian reference.

Accordingly, for the foregoing reasons, we sustain the rejection of claims 1, 4–10, 13–19, and 26–28 under 35 U.S.C. § 103(a) as being unpatentable over Mann and Arzoumanian.

*Claims 1, 10, 16, and 18--Obviousness--Lebel/Arzoumanian*

Appellants' arguments are based on the flawed premise that Arzoumanian is nonanalogous art, which we address above in the analysis directed to Mann and Arzoumanian. Appeal Br. 3–8. We are thus not

apprised of Examiner error in the rejection of claims 1, 10, 16, and 18 as being unpatentable over Lebel and Arzoumanian. The rejection is sustained.

## DECISION

The rejections of claims 1, 4–10, 13–19, and 26–28 under 35 U.S.C. § 103(a) are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED